IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1211 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

POPATLAL VADILAL BHANSALI

Versus

KASTURBHAI RANCHHODBHAI SONI

Appearance:

MR SHALIN N MEHTA for the Petitioners.

MR HM PARIKH for Respondent No. 1-5

MR.HEMANG H PARIKH for Respondent No. 1-5

CORAM : HON'BLE MR.JUSTICE KUNDAN SINGH

Date of decision: 02/09/2003

ORAL JUDGEMENT

This Revision Application has been preferred by the petitioners-original defendants-tenants

against the judgment and order dated 30.8.2002 in Regular Civil Appeal No. 31 of 1997 passed by the 5th Extra Assistant Judge, Kheda at Nadiad whereby the judgment and decree dated 10.2.1997 in Regular Civil Suit NO. 338 of 1990 passed by the 5th Joint Civil Judge (S.D.), Nadiad for recovery of actual, vacant and physical possession of the suit shop from the defendants has been confirmed.

2. The petitioner no.1 Popatlal Vadilal Bhansali is the original tenant of the suit property which was rented to him for business purpose. The petitioner no.1 was doing his business of hosiery and readymade clothes in the name and style of Deepmala Dresses. Thereafter, that business name was changed and the firm Parth Jewellers was started in the suit premises. The respondents-plaintiffs did not see the petitioner no.1 sitting regularly in the suit shop. Hence, they filed Regular Civil Suit no. 338 of 1990 against the petitioners-defendants for vacant possession of the suit shop from the defendants and for the recovery of Rs.170/- p.m. from the person and property of the defendant no.1 and also damages of Rs. 170/- from 1.5.1990 for not using the suit shop and arrears of rent from the defendants. In the suit, the plaintiffs also prayed for Rs.85/- from the date of the suit till the date of possession from the defendant no.1 together with municipal taxes, education tax and other taxes by way of mesne profits alongwith costs of the suit. It is stated in the plaint that the defendant no.1 was the tenant of the previous landlady Revaben. From her, the defendant no.1 has taken the suit shop on rent for Rs.85/- per month as standard rent. Municipal taxes, education tax and other taxes were to be paid by the defendant no.1. The defendant no.1 was carrying on his business of readymade clothes and hosiery in the name and style of Deepmala Dresses. It is also stated that the defendant no.1 has been intending to illegally sub-let, assign or transfer the suit premises by leave and licence and he has sub-let by leave and license or by any other mode and assigned or transferred physical possession of the suit shop to the defendant no. 2 by executing a bogus and false partnership deed. The defendant no.1 has put a false date on the partnership deed which was prior to the service of ad-interim injunction granted to him. The defendant no.1 has handed over physical possession of the suit property. Hence, the suit. The defendant no.1 has paid rent upto 1.5.1990. Thereafter, he has not paid any rent.

3. The defendants have filed their written statement to the suit in which they have denied that the

defendant no.1 has taken the suit shop on standard rent of Rs.85/- per month from the previous landlady Revaben and they have also denied that the rent was payable per month. But the defendants have admitted that the defendant no.1 has taken the suit shop on rent to carry on the business from the previous landlady Revaben. She had filed M.C.A.No. 154 of 1990 against the defendant no.1 in the court to fix the standard rent, but the matter was compromised between defendant no.1 and the landlady. It is also admitted that the defendant no.1 was doing business of readymade garments and hosiery in the suit shop. It is also admitted that the suit shop is situated in the bazar wherein most of the shopkeepers are doing business of gold and silver. Therefore, the defendant no.1 has started the business of gold and silver in the suit shop. The allegation of sub-letting or transfer of the suit shop to other defendants has been denied by the defendant no.1 in the written statement.

4. After recording evidence and after hearing the arguments of the learned advocates for the parties, the trial Court has recorded a finding that under camouflaged partnership deed, the defendant no.1 has sub-let the suit shop to defendant nos. 2 to 5 and by its judgment and decree dated 10th February, 1997 decreed the suit with costs for recovery of actual and vacant possession of the suit shop from the defendants. The defendants were also directed to hand over vacant possession of the suit shop to the plaintiffs within two months from the date of the order. Being aggrieved and dissatisfied with the judgment and decree of the trial court, the petitioners-original defendants-tenants filed Regular Civil Appeal No. 31 of 1997 before the District Court. After appreciating the evidence of the parties on record and after considering the arguments of the learned advocates for both the parties, the lower appellate court vide its judgment and order dated 30th August, 2002 dismissed the appeal and confirmed the judgment and decree of the trial court.

5. Therefore, being aggrieved by the concurrent findings of the courts below, the petitioners-original defendants have filed the present Civil Revision Application under section 29(2) of the Bombay Rent Act before this Court.

6. Heard the learned counsel for the parties at length and perused the relevant papers on record. The contention of the learned counsel for the petitioners is that the courts below have applied wrong test for arriving at a conclusion that the property was sub-let

and the only formula has been applied by the courts below is that the defendant no.1 is not using the premises. The courts below have not considered the real test for recording a finding that the defendant no.1 has sub-let the suit property. The test is whether the possession of the suit shop has been parted with or not. Further contention of the learned counsel for the petitioners is that the findings recorded by the courts below that the partnership is a bogus and sham one and some clauses of the partnership deed have not been complied with are perverse, wrong and not sustainable in the eye of law. The burden lies on the plaintiff to prove the case of sub-tenancy. The defendant-tenant is not required to prove anything. The landlords have not established the fact that the property has been sub-let to the petitioner nos. 2 to 5. He also argued that the case law cited in support of the contentions of the defendants have not been properly considered by the courts below. Section 13(1)(e) of the Bombay Rent Act has not been properly interpreted by the courts below. It is also the contention of the learned counsel for the petitioners that the findings recorded by the courts below are perverse as there is no evidence of sub-letting at all. Even no inference can be drawn on the basis of the evidence and material on record. The courts below have not recorded the finding that the tenant has parted with possession to other partners and the tenant is not using the said premises. The contention of the learned counsel for the petitioners is that the partnership deed executed by the defendant no.1 cannot be said to be a bogus or sham one and it has been supported by the following material. There is an existence of partnership deed dated 29th March 1990 exh. 43. He referred clause-4 of the partnership deed which says that at the end of every accounting year in the said partnership firm, whatsoever profit and loss that shall remain after deducting all expenses such as salary, interest, discounting, commission, stationery, printing, postage and telegram, travelling, electricity, advertisement, repairing, depreciation or business tax, licence fees etc. and all such other expenses as per the business tradition and remaining amount of profit or loss shall be distributed amongst all the five partners in the following proportions.

Name	Profit/loss
1. Popatlal Vadilal Bhansali	20%
2. Dilipbhai Bansilal Chokshi	29%
3. Kantaben Bansilal Chokshi	17%
4. Naynaben Vinodchandra Chokshi	17%
5. Alkaben Jagdischandra Chokshi	17%

Clause-8 of the partnership deed says that necessary bank account and shroff account shall be opened in the name of the firm and they shall be operated by the joint signature of the first and second parties. Necessary and appropriate changes for the convenience of the firm may be made in future with the written consent of all the parties. Para-9 of the deed says that all the partners in the said partners in the said partnership firm together shall work in harmony for the development of the firm. Moreover, the first and second party shall handle the day to day routine business of the said firm, such as purchase, sales, collection, accounts, correspondence of the firm, operation of Bank and shroff account and Income-tax, Sales Tax, Professional tax, Shops and Establishment Act, excise and all other Government procedures etc. whereas, the third to fifth parties are the capital investing partners, whenever the necessity of money arises for the further development of business, they shall procure the same on interest in the form of capital or loan or as a deposit. Para-13 of the partnership deed says that as the first party has obtained the place of business of the said partnership firm on rent in his own individual name from the landlord of the said place of business, so long as the said partnership remains in existence and thereafter also, no person, other than the first party, shall have any tenancy rights, ownership right, user right or any other right or claim over the place of business of the said firm. In other words, all the tenancy rights over the said place of business shall always be considered as of first party only just as they will remain in existence prior to the establishment of the said firm. Para-14 of the partnership deed says that no partner of the said partnership firm shall directly or indirectly sell, mortgage, tranfer or assign his/her right and share in the partnership firm in favour of any one, and if he/she does so, his/her such an act shall not be binding to the firm.

(ii) The second document shown by the learned counsel for the petitioners is the certificate of registration exh. 14 which is dated 4th October, 1990. As per the provisions of section 68 of the Indian Partnership Act, 1932, any statement, intimation or notice recorded or noted in the register of firms, shall be authenticated (iii) The third type of document shown by the learned counsel for the petitioners is the certificate under Gujarat professional business Trade and Employment Rules, 1976 which is at exh. 45. (iv) A copy of the application dated 7.6.1990 for registration of firms for the purpose of sales tax by all the partners,

wherein the shares of the partners have been defined. (v) Exh. 46 is the certificate dated 15.6.1990 under the provisions of Bombay Shops and Establishment Act issued by the authority granting permission to start the business under the provisions of that Act. (vi) Exh. 51 is the assessment order passed by the Income-tax Department which is dated 4th February, 1993 for the assessment year 1992-93 wherein it is mentioned that the firm is genuine and shows the shares of the partners. The petitioners have also pointed out from the income-tax return (statement of total taxable income) for the year 1993-94 showing the partnership deed attached and the salaries to partner nos. 1 and 5. It was also pointed out that though the salary was not permissible under the partnership deed to any of the partners, but lateron the income-tax rebate regarding salasry to partner was allowed under Income-Tax Act and hence some amendment was made in the partnership deed regarding salary to the partner nos. 1 and 5, though that amended partnership deed is not on record. But as per the statement made in the income-tax return, it appears that the amended partnership deed was filed. On that basis, the salary was permitted by the Income-tax Department. Otherwise, had it not been so, the salary must have been disallowed by the Income-tax department. (vii) The statement of total income for the year 1994-95 exh. 53 showing the salary of both the partners. Exh. 54 is the statement of total taxable income for the year 1995-96 showing that the share of both the partners as 20% and the salary was increased to 30% from the profit. Exh. 55 is the Income-tax return for the year 1996-97 showing the share as 20% and salary 30%. (viii) Exh. 56 is the capital account of the partners in the partnership firm for the year 1990-91. Exhs. 57 to exh. 61 are all capital accounts of the partners for the respective years. (ix) Exhs. 62, 63 and 64 are the receipts of payment of professional tax made by the defendant no.1 as partner of the firm. Exh. 65 is the communication by the department addressed to the firm through defendant no.1 as a partner asking information about the registration number allotted to other partners. (x) The bills issued in the name of the firm which are exhs. 66 to 88 have been filed by the petitioners which were signed by the defendant no.1 at the relevant time when they were issued.

7. It is also contended by the learned counsel for the petitioners that the burden has been wrongly shifted on the petitioner no.1 -defendant no.1 that he is using the shop in dispute. To make out the transfer of possession cannot be attributed to

sub-letting and the defendant no.1 has to prove that he is using the suit premises though as per the rule laid down by the Supreme Court, the burden is on the landlord to show that the tenant has parted with his possession of the suit premises and other person has been placed in exclusive possession. The lower appellate court has recorded a finding shifting the onus of proof on the tenant that the appellants have not proved that they have not sub-let the suit shop to other appellants. The learned counsel for the petitioners has relied on the following decisions.

7.1. The judgment of this Court in the case of Manchharam Sobhraj and others vs. Jamnadas Mulchand and another reported in 16 GLR, 898 wherein this Court has held that if a tenant walks out of the premises in his possession and allows a third party to carry on his business under a sham or camouflage partnership with the tenant it may amount to an act of unlawful sub-letting by the tenant if the camouflage partnership has been entered into for the purpose of screening the act of unlawful sub-letting. Similarly if a tenant has parted with possession of his premises and put his another partner in exclusive possession thereof, it will amount to an act of unlawful sub-letting because such an act connotes a transfer of legal interest in the premises from the tenant to some else. Similarly, if a third party is permitted by tenant to carry on his own business in the premises it may lead to an inference of unlawful sub-letting because the tenant has no interest in the profit and loss of business can be said to be no longer interested in the premises. The Bombay Rent Act does not prevent a tenant who has taken on rent business premises from taking partners in his business and carry on a partnership business. So long as the right of occupancy as a monthly tenant in respect of the premises remains with the tenant and does not form a part of the assets of the partnership firm, there cannot be said to be any sub-letting. Different consideration will certainly prevail if the tenancy rights have been amalgamated in the pool of partnership deeds and all partners are entitled to a share therein upon the dissolution of the partnership. Even if the rent of the premises let to a tenant is payable under the deed of partnership by the partnership firm of which the tenant is a partner it does not amount to unlawful sub-letting but it is merely a matter of partnership accounts. Unless therefore, there is evidence to show that a tenant has transferred "legal possession" to his partners with whom he has been constituting a partnership firm, he cannot be said to have unlawfully sub-let, assigned or transferred his

interest in the premises within the meaning of section 13(1)(e) and section 15 of the Bombay Rent Act.

7.1 The judgment of this Court in the case of Budhalal Chhotalal Zaveri vs. Lilavatiben Ratilal reported in 1994(1) GLR, 209 wherein the ingredients of sub-letting have been described. Under section 13(1)(e) a landlord shall be entitled to recover possession of the demised premises if the Court is satisfied that the tenant has, since the coming into operation of the Act, unlawfully, sublet the whole or part of the premises or assigned or transferred in any other manner his interest therein. Under clause (e), the landlord has to prove (i) that the tenant has sublet, assigned or transferred in any other manner his interest in the demised premises (ii) that it is done after the commencement of the Act and (iii) that it is unlawful. The tenant incurs liability to eviction under this clause when unlawful sub-letting is established even on or before the date of notice. It is not further necessary to show that the sub-letting should be subsisting at the date of the suit. Thus, any sub-letting, assignment or transfer made after the commencement of the Bombay Rent Act, if it is found to be unlawful, it is made a ground for eviction. In order to hold a tenant guilty for sub-letting or for unlawful transfer or assignment, it must be successfully shown that the tenant has lost the possession and that he has abandoned his interest in the demised premises. In a case of partnership, all the partners are joint in respect of partnership properties subject to the extent they have agreed. In an assignment, the assignor transfers the totality of his rights and interests to the assignee. The transaction results in the assignor being denuded of the entire interest and the assignee replacing him and acquiring the interest in the property. If the tenant of a shop takes one or more partners for doing business in the demised shop, would this itself constitute either sub-letting or assignment. The answer would be positively in the negative. Even assuming that the tenancy interest had been thrown into the partnership firm, even in that case also, the tenant continues to have an interest alongwith other partners. Unless it is shown that the original tenant's entire leasehold interest has been extinguished and that of some one else to the exclusion of the original tenant is created, it is futile to contend that there has been an assignment or transfer of interest. It has also been held that taking a partner or entering into a partnership firm for doing a business in a demised shop "ipso facto" also would not constitute an act of sub-letting. Sub-letting postulates two distinct personalities: the head tenant and the

sub-tenant. Undoubtedly, their rights and obligations would be different. One cannot be one's own sub-tenant. If the transaction of taking in partners constitutes sub-letting, the defendant-tenant will be a head tenant and he himself alongwith his other partners will also be sub-tenant, as the partnership firm, as such, he has no separate legal entity. It must be successfully shown that there was a transfer of legal possession. There is a distinction between actual possession and legal possession. What is contemplated is the transfer of legal possession. The physical occupation may be of one or more partners, but the legal possession would remain with the tenant, if such a possession is not parted with, with or without consideration. Thus, if the partners of the firm attend the shop and do business alongwith the tenant, it cannot be contended that the partners are in legal possession of the demised shop. When a partner has brought in as his asset tenancy of the premises in which the partnership business was to be carried on, the fact that the partner in question was to share the profits only and was to get a fixed percentage of the profits or the further fact that the said partner was not to operate the bank accounts, there being nothing intrisically wrong in law from constituting a partnership in the manner it was done, it could not be said that no genuine partnership had come into existence.

7.3. The decision of the Supreme Court in the case of Helper vs. Saiyed Mohmad Mirasaheb Kadri and others reported in AIR 1987, SC, 1782 wherein it has been held that in order to establish partnership (1) there must be an agreement entered into by all parties concerned (2) the agreement must be to share profits of business and (3) the business must be carried on by all or any of the persons concerned acting for all. For the exercise of revisional jurisdiction under section 29(2), this case has been relied on by the learned counsel for both the parties. It has been held that in exercising revisional power under section 29(2) the High Court must ensure that the principles of law have been correctly borne in mind by the lower court. secondly, the facts have been properly appreciated and a decision arrived at taking all material and relevant facts in mind. In order to warrant interference, the decision must be such a decision which no reasonable man could have arrived at. Lastly, such a decision does not lead to a miscarriage of justice. But in the guise of revision substitution of one view where two views are possible and the Court of Small Causes has taken a particular view, is not permissible. If a possible view has been taken, the High Court would be exceeding its jurisdiction if it

substitutes its own view in place of that of the courts below because it considers it to be a better view.

7.04. The judgment of the Supreme Court in the case of Jagdish Prasad vs. Smt. Angoori Devi reported in AIR 1984, SC, 1447 wherein it has been held that merely from the presence of a person other than the tenant in the shop subletting cannot be presumed. So long as control over the premises is kept by the tenant and the business run in the premises is of the tenant, subletting flowing from the presence of a person other than the tenant in the shop cannot be assumed. The Act does not require the court to assume a sub-tenancy merely from the fact of presence of an outsider. Where, therefore, an application for eviction of tenant from a shop was based on the allegation that the premises had been sub-let to a trading company, this allegation had to be proved as a fact by the landlord and merely on the basis of the photograph showing the presence of the son of the proprietor of that company within the room, subletting could not be presumed. The legal position having been totally misconceived by the trial court and there being an assumption of the position which the landlord was required to prove by evidence, the revisional authority was entitled to point out the legal error and rectify the defect.

7.05. The decision of this Court in the case of Mehta Jagjivan Vanechand vs. Vanechand Harakhchand and others reported in AIR 1972, Gujarat, 6 wherein it has been observed that previously the tenant himself was using the shop and doing business. Now, the plaintiff alongwith his two partners, defendant nos. 2 and 3 is using the shop and doing business. This constituted either sub-letting or assignment. The answer is clear cut and unfaltering "no". The reasons for forming this opinion may now be considered in some detail. It may be considered whether this constitutes assignment. In an assignment the assignor transfers the totality of his right, title and interest to the assignee. The transaction results in the assignor being denuded of his entire interest and the assignee replacing him and acquiring the entire interest in his step. The assignor who had an interest previously would not have any interest howsoever little left with him any more. The assignee acquires the interest though previously he had none. What previously belonged to the assignor(and none else) now belongs to the assignee (and no other). Moreover, tenancy interest cannot be split up in two parts and therefore, a tenant cannot assign the tenancy interest to a partnership of which he himself is a

partner.

7.06. The decision of Supreme Court in the case of Madras Bangalore Transport Company (west) vs. Inder Singh and others reported in (1986) 3 SCC, 62 in which it is observed that a shop was let out originally to a certain firm of three partners. The business of the partnership was closed before November, 1955 and thereafter a new firm consisting of the erstwhile partner of the original firm and a stranger started doing business from the same premises. The question arose whether in these circumstances it could be said that there was sub-letting. The contention that the old firm and the new firm were different legal entities and therefore the occupation by the new firm amounted to sub-letting by the old firm was repelled by the Court observing that the contention is entirely without substance. A firm unless expressly provided for the purpose of any statute which is not the case, is not a legal entity. The firm's name is only a compendious way of describing the partners of the firm. Therefore, occupation by a firm is the occupation by its partners. Here the firm have a common partner. Hence, the occupation has been by one of the original tenants.The entry of a stranger as a partner of the new firm indicated that there was sub-letting was not also accepted. The Supreme Court relying on another decision in the case of G.Rangamannar vs. Desu Rangiah held that there cannot be a sub-letting, unless the lessor parted with legal possession. The mere fact that another is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease.

7.07. The decision of the Supreme Court in the case of P.A.Thomas and another vs. M.Mohammed Tajuddin and another reported in (1989) 3 SCC, 240. On the basis of the averment that it was the appellant no.1 who retained legal possession of the said premises and the appellant no.1 was the managing partner and others were his sons and his son-in-law and ex-employee and that it was appellant no.1 who retained the controlling interest in the said partnership firm, the Supreme Court could not find from the judgment any evidence in this connection nor the evidence in this connection appeared to be included in the record. Hence, the matter was remanded to the High Court for giving a finding as to whether the appellant no.1 retained effective control over the affairs of the said partnership firm with a direction to the High Court to take into account the partnership deed and all other evidence which is on record.

7.08. The decision of the Madras High Court in the case of Gundalapalli Rangamannar Chetty vs. Desu Rangiah and others reported in AIR 1954, Nadras, 182 in which it is held that there cannot be a sub-letting unless the lessee parted with legal possession. The mere fact that another is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. To create a lease or sub-lease a right to exclusive possession and enjoyment of the property should be conferred on another.

7.09. The decision of Punjab and Haryana High Court in the case of Nandu Mal and others vs. Ramji Lal and another reported in AIR 1952, Punjab, 403, it has been held that the terms of an agreement whereby Ramjilal was to have no interest in profits and no concern in losses is enough to take the agreement out of the definition of "partnership." It is not every transaction by the lessee with a third party which must amount to a transfer, subletting or parting with possession. The clear intention of the parties was that Babulal was to have use of the premises to carry on a business of his own. In the absence of evidence on the point of transfer of possession the finding must be that the plaintiff landlords had failed to establish that there was subletting or parting with possession of the premises so as to give them a cause of action to evict the lessee under section 9(1)(b)(ii).

8. On the other hand, the learned counsel for the respondents-landlords contended that the sub-tenancy of the tenant has been established and in order to establish sub-tenancy, he pointed out the following pieces of evidence. (1) the tenant has no experience of the new business (2) the rent paid by the petitioners is not reflected in the account books produced by him. (3) the professional tax paid not reflected in the account books (4) the bills prepared by any other partner were signed by the defendant no.1 (5) The office copies signed by the defendant no.1 are only to create the evidence. There was no need to be signed by the defendant no.1. They could have been signed by other partner, who prepared it. (6) The defendant no.1 was not knowing any traders from whom the articles were purchased though he was a working partner and the bank account was being conducted by two persons, as per the terms of the partnership deed. Had he been a working partner and had he signed cheques for payment within the period of six years, he must be knowing some of the traders. (7) It is to be seen that as per the partnership deed, he was working or not or the deed has

been created only in order to protect tenancy rights. (8) As per the partnership deed, no salary was to be given to any of the partners, even then the salary was given to the partners which is in consistent with partnership deed. As stated by the learned counsel for the petitioners that clause of that partnership has been amended, but the copy of the partnership deed wherein the relevant clause was amended is not on record. It was pointed out by the learned counsel for the petitioners that the partnership deed containing the amended clause is not on record. According to the learned counsel for the respondents, that could have been filed by the petitioners even after deposition of p.w. no.1 in the year 1996, but the said amended deed has not been brought on record. (9) The partnership deed is sham and bogus and in this regard the finding of fact recorded by the courts below is on the basis of the evidence on record. Even if another view is possible, the court should not interfere with the concurrent findings of the courts below in the revisional jurisdiction. In support of his arguments, he relied on the following decisions.

8.01. The decision of the Supreme Court Supreme Court in the case of Patel Valmik Himmatlal and others vs. Patel Mohanlal Muljibhai (deceased) through LRs. reported in 1999 (1) GLR, 15, wherein it has been observed that revisional jurisdiction could only be exercised for limited purpose with a view to satisfying itself that the decision under challenge before it is according to law. The High Court cannot substitute its own findings on a question of fact for the findings recorded by the Courts below on re-appraisal of evidence. The powers under section 29(2) are revisional powers with which the High Court is clothed. It empower the High Court to correct errors which may make the decision contrary to law and which errors go to the root of the decision but it does not vest the High Court with the power to re-hear the matter and re-appreciate the evidence. The mere fact that a different view is possible on re-appreciation of evidence cannot be a ground for exercise of the revisional jurisdiction. Both the courts had rightly come to the conclusion that the tenant had infact sub-let the suit premises and parted with the possession of the premises without consent of the landlord.

8.02. The decision of the Allahabad High Court in the case of Haji Abdul Shakoor vs. The Rent Control and Eviction Officer, Kanpur and others reported in AIR 1959, Allahabad, 440 wherein it has been held that the finding recorded by the court below was that there was no

genuine partnership. The finding is one of fact and will not be disturbed in proceedings under Article 226.

8.03. The decision of the Supreme Court in the case of Smt. Rajbir Kaur and another vs. M/s. S.Chokosiri and Company reported in 1988, SC,1845 wherein it has been held that when the findings of fact recorded by the courts below are supportable on the evidence on record, the revisional Court must be reluctant to embark upon an independent reassessment of the evidence and to supplant a conclusion of its own, so long as the evidence on record admitted and supported the one reached by the courts below.

9. Therefore, in the instant case the concurrent findings as to exclusive possession of sub-tenant was not amenable to reversal in revisional jurisdiction. In a suit for eviction on ground of subletting if exclusive possession is established and the version of the tenant as to the particulars and the incidents of the transaction is found unaccetapble in the particular facts and circumstances of the case, it may not be impermissible for the court to draw an inference that the transaction was entered into with monetary consideration in mind. It is open to the tenant to rebut this. Such transactions of subletting in the guise of licences are in their very nature clandestine arrangements between the tenant and the sub-tenant and there cannot be direct evidence got. It is not, unoften, a matter for legitimate inference. The burden of making good a case of subletting is, of course, on the landlord.

9.01. He also relied on the decision of this Court in the case of Bhagwati Spg. and Wvg. Works vs. Ahmedabad New Cotton Mills Co. Ltd. reported in 20 GLR, 932 wherein it has been held that the burden of proof shifts on the tenant as the act of subletting produces the serious consequences under the Act. It can certainly be inferred from other circumstances.
The fact may be proved expressly or it may be inferred from other facts. It is extremely difficult for a landlord to show that there was valuable consideration between the tenant and the sub-tenant, particularly when the act of subletting produces the serious consequences under the Act. Therefore, where in a given case the existence of valuable consideration cannot be proved expressly, it can certainly be inferred from other circumstances. It may be a proof by inference. It is difficult to imagine that a total stranger will be inducted by a tenant into his leasehold premises or a part thereof without any valuable consideration.

9.02. He also relied on the judgment of this Court in the case of Dudhabhai alias Dadubhai Karsandas Patel and others vs. Sulochandben Gopaldas Kothari reported in AIR 1995, Gujarat, 68 wherein it has been held that once it is proved that in relation to a business premises, the tenant has walked out of the premises leaving the premises to another person (may be, that another person may be his brother) and that another person is in exclusive possession of the business premises, it would not be out of place to raise an inference that parting of possession by the tenant in favour of that another person must be for valid consideration and the burden would be upon the tenant or the sub-tenant, as the case may be, to prove that parting of possession-both legal and physical-by the tenant in favour of that other person was without any valid consideration.

9.03. The learned counsel for the respondents also placed reliance on the decision of the Supreme Court in the case of M/s. Bharat Sales Ltd. vs. Life Insurance Corporation of India reported in AIR 1998, SC, 1240 wherein it has been observed that it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Inference as to subletting can be drawn from the proof of delivery of exclusive possession of the premises by the tenant to sub-tenant.

10. In the present case, the following questions fall for my consideration. (1) Whether the partnership deed is bogus and sham ? (2) Whether the defendant no.1 parted with legal possession of the property to other partners amounting to sub-letting of the suit premises and (3) whether the landlady has proved that the tenant has sub-let the premises or transferred his interest in the premises or the tenant has to prove that the legal possession of the property has not been parted with or transferred interest in partnership firm to other person. In this connection, first of all, we have to see the findings recorded by the trial court as well as lower appellate court. To prove the fact that the property has not been sub-let to any person, the defendant no.1 relied on the partnership deed, registration of partnership firm, certificate of professional tax, certificate of Shops and Establishment

Act to show that the shop is in possession of Parth Jewellers. and bills issued and signed by him. Previously, the defendant no.1 was doing the business of hosiery and readymade garments in the name and style of Deepmala Dresses. He was not having experience of business of goldsmith. He has invested only Rs. 20,000/in the partnership firm. Thereafter, he has not invested any amount. He was not able to say that how much profit he was getting from the partnership business at the ratio of 20%. He also relied on the income-tax returns for the accounting years 1990-91, 1991-92, 1992-93, and the the income-tax returns for the accounting years 1992-93, 1993-94, 1994-95 and the assessment order exh. 51 of M/s. Parth Jewellers. By all these documents of income-tax, the Courts below found that it cannot be presumed that the defendant no.1 is using the said shop. Merely because Income-tax department has accepted the returns and passed assessment orders of M/s. Parth Jewellers, it cannot be presumed that the defendant no.1 is using the suit shop. He entered into partnership with other persons on 29th March, 1990 and he was not well to do. He requires money for the family. Considering the certificate of amounts withdrawn by the petitioner no.1, the trial court found how a person can maintain in such a meagre amount. When the defendant no.1 was not running the shop properly, he entered into partnership firm as per his say. But looking to the account books, he has not withdrawn any amount to maintain his family which shows that the allegation of the plaintiffs that he has taken a huge amount from the defendant nos. 2 to 5 cannot be discarded. On the basis of the partnership deed, it cannot be presumed that he is using the suit shop. Under the terms of the deed of partnership, no partner was permitted to receive the salary, but the defendant and another partner had received the salary besides the share in the profit. As such, it was in breach of the lease terms. In that respect, the defendant no.1 has not stated anything nor any evidence has been adduced by him. Under the camouflaged partnership deed, the defendant no.1 has sublet the suit shop to the defendant nos. 2 to 5. The lower appellate court has recorded the finding that the appellant nos. 3 to 5 invested capital amount in the firm and other appellant nos. 1 and 2 have not made any investment as capital shown in the partnership deed. As per clause 10 of the partnership deed, no partner has to take salary and remuneration, but the appellants have produced the extracts of books of accounts from the years 1992 to 1996 at exhs. 58 to 68. It is mentioned on correct side the salary received. Thus, all the appellants have made breach of partnership

deed. In the partnership deed, it is mentioned that the appellant no.1 has not an experienced man. He is not sitting in the suit shop. He has no knowledge about selling and purchase of goods of gold and silver. He does not know about its profit. He does not know about whole profit of the partnership firm. The documentary evidence at exhs. 58 to 61 show that the appellant no.1 has taken salary from the firm. Thus, it is clear that the appellant no.1 has made only a show that he has created a partnership with other appellants, but in fact, the circumstances speak that the appellant no.1 has only prevented the possession of the suit shop and he has created partnership with other appellants. Reading exh. 43 and other documentary evidence, and the evidence of defendant no.1, it clearly appears that the partnership deed is not a genuine partnership, but it is only sham and bogus. In this respect, the learned counsel for the petitioners pointed out that this fact is wrongly mentioned by the lower appellate court that the tenant is not seen sitting on the suit shop. The lower appellate court has wrongly mentioned that he does not know about its profit and he does not know about whole profit of the partnership firm. In this respect, in the trial court's judgment, it is stated that he is not able to say the exact figure without verifying the books of accounts that how much amount is received by him by way of profit from the partnership business. It is also found by the lower appellate court that the defendant no.1 has not produced only balance sheet as per books of accounts maintained by the partnership firm. Had the balance sheet been produced, then it would have come on record as to what expenses were borne by the firm and it would also have come on record as to any amount has been deposited as rent by the tenant or by the partnership firm. The appellants have not produced the accounts of expenses of the firm. The professional tax has not been debited in the account of the appellant no.1. As per the deed, the appellant no.1 himself was not carrying on the business.

11. I have carefully considered the contentions advanced by the learned counsel for the parties and also perused the findings recorded by the courts below. It is a well established proposition of law that a partnership firm can beestablished by the tenant in the rented premises for commercial purposes, the partnership business can be carried by all the partners or any one of them on behalf of all other partners. Some partners may contribute finance, some partners may contribute their knowledge and experirnce, some partner may provide place for business but partnership deed must show the ratio of profit and loss

in the earning from thebusiness of the partnership firm. The presence of a tenant is not necessary at the suit premises if the partnership has been entered into by the tenant with some other partners. Mere absence of the tenant at the rented premises would not be sufficient to hold that legal possession has been parted with by the tenant. For that purpose, other factors have to be taken into consideration. One of them is that the partnership deed is required to be looked into and examined in order to know the participation of each partner and shares in the business of the firm. So far as the burden of proof is concerned, it is always on the party who makes an allegation. In a rent case, it would be the obligation on the part of the landlord to establish that legal possession has been parted with and the tenant has no interest in the business being carried on by other persons to whom the rented property has been given. For that purpose, the landlord is required to show that the property is not being used either by closing it down or it is being used by some other person and the tenant is not doing business as he was not found on the shop carrying on the business in usual course of business. In case, the landlord makes out a prima facie case that the suit property which was let out to the tenant has not been used by the tenant and that is being used by some other person, then as per the case laws referred to above, it would be difficult for the landlord to show that there is an understanding between tenant and other persons in respect of the suit property or right to carry on the business. Then the burden of proof would shift on the tenant to show that he is using the property or he is holding legal possession. Legal possession has not been parted with and he has the share in the profit or loss of the partnership firm. As provided by section 106 of the Indian Evidence Act, the burden of proving a fact is on the person who is within the knowledge of that fact. When the burden of proving that fact is upon him as a tenant and has created the partnership firm with the help of other persons and he is carrying on the business, that is within the knowledge of the tenant and he has to prove that he has entered into the partnership and he is using the property for the purpose of partnership business. As such, in the present case, the landlord has proved that he is not finding the defendant no.1-tenant on the suit property carrying on business in usual course and that the property has been occupied by Parth Jewellers firm, then automatically the landlord would come to a conclusion that the property has been sub-let or assigned to a person carrying on business in the same premises. In this regard, that presumption would be rebuttable by the tenant proving the fact that he is doing business

with other partners and he has not parted with legal possession of the suit property to any other person, but to the firm in which he is one of the partners. In the instant case, the petitioner no. 1 has produced on record sufficient material and evidence to hold that he has entered into the partnership deed with other petitioners and he is one of the five partners. As he has created this partnership deed, he was not knowing fully or conversant with the goldsmith business or jewellery business, for this purpose, he has to involve other persons who have full knowledge and experience to carry on goldsmith business and three financing partners were inducted to provide finance to the partnership firm. The partnership deed was executed on 29th March, 1990 giving out complete details of the terms and conditions and the share of the partners in the profit and loss. That partnership was registered and the certificate of registration has been placed on record of the trial court at exh. 44. As the petitioner is one of the partners, the statements made in the partnership deed are binding on all the partners under section 68 of the Partnership Act. If the partnership firm incurs losses, then the loan advanced from any institution or the money borrowed from any firm could have been recovered from all the partners including defendant no.1. The certificate has also been filed which was issued under Gujarat Professional Business Trade and Employment Tax Rules, 1976 exh. 45. The application was moved on 7.6.1990 for registration of the firm for the purpose of sales tax by all the partners giving out the share of all the partners. Exh. 46 is another certificate issued by the authority under the provisions of the Bombay Shops and Establishment Act to the firm. The assessment order issued by the Income-tax Department dated 4.2.1993 at exh. 51 shows that the firm is a genuine one. Whenever income-tax return is filed, a copy of the partnership deed has to be filed giving out the shares of profit and loss of each partner. In the statement of total income taxable for the year 1993-94, expenses by way of salary have been shown to the partners including the petitioner no.1 as rebate in the tax was allowed in Income Tax Act from that year. Had it been inconsistent with the clause of the partnership deed, that no partner will be entitled for the salary or remuneration, there must have been objection by the Income-tax Department. It appears that some amendment was made by the partners in the partnership deed. As per the partnership deed, the amount of salary was made permissible and as per the Income Tax statute, the benefit for the amount of salary was made permissible. Hence, the Income-tax department found it genuine and allowed the same and no objection

has been raised by the department in that connection. Even amended partnership deed is not on record, it could be presumed under the facts and circumstances that there is a clause relating to salary to defendant no.1-tenant and other partner which has been amended and as per that amendment, the salary was made permissible under the partnership business. In that respect, the limit of deduction was made permissible as per Income-tax Act. As such, the findings recorded by the courts below that the partners have committed breach of the terms of the partnership deed are not sustainable in the eye of law. The petitioner no.1 has also filed capital account of the partners in the partnership firm from the year 1990-91 at exhs. 56 to 61. The receipt of payment of professional taxes has also been placed on record at exhs. 62, 63 and 64. It is contended on behalf of the respondents that those receipts filed by the defendants were false and concocted, but the defendant no.1 tenant has also filed communication sent by the department addressed to the firm through defendant no.1 asking information about the registration no. allotted to other partners. The bills had been issued in the name of the firm signed by the defendant no.1 at exhs. 66 to 88. The contention of the learned counsel for the respondents is that the bills had been prepared by some other partners and there was no need for signing them by the petitioner no.1. Those bills could have been signed by the partner who had prepared the same. The bills might have been prepared by some servant on duty and signed by the defendant no. 1. Even if such bills have been prepared by any of the partner or some other person and issued by the petitioner no.1 by signing it, there is no apparent illegality. It is not required that every bill must be signed by the person who has prepared it. If such an act can be done by two persons, then it is absolutely irrelevant to say that that bill must be signed by the person who has prepared it and that should not be signed by the petitioner. This argument is not tenable in the eye of law inasmuch as no law provides for the signature by a person while preparing the bills to the customers. It was also pointed out by the learned counsel for the respondents that during the period of six years, the petitioner no.1 could not name any trader with whom transaction of the business had taken place. It is already mentioned in the partnership deed that the petitioner no.1 tenant was not having sufficient knowledge or was not conversant with the jewellery business. Hence, he has to take the help of some person inducting him as a partner. If he has already inducted such persons, for that purpose, the petitioner cannot be at fault and it cannot be inferred that he has not made

any business transaction with any trader as the share of the petitioner was to give the place of business and he has also invested an amount of Rs.20,000/-. If he was not found sitting on the place of business in usual course, it cannot be inferred on any presumption that he has parted with legal possession of the suit property to other partners of the firm. On the basis of the evidence on record, there is no iota of material or evidence on record to show that the defendant no.1 has parted with his legal and exclusive possession of the suit shop to any other person and it is clearly established that the petitioner no.1 has inducted other four persons forming the partnership firm for which a partnership deed has also been executed and that was registered and all formalities were completed in the manner provided under the law. Only on the basis of the fact that he was not found sitting on the place of business, it cannot be said that he has parted with legal possession of the suit shop to other persons with whom he had no concern. Under these circumstances, the landlord has failed to prove that the petitioner no.1 has parted with legal possession of the property to some other persons. On the basis of the evidence, if it appears that there is a firm and he is one of the partners of that firm, then it will not be presumed that he has parted with legal possession of the suit premises to other persons as he is one of the partners and more particularly when the clauses of the partnership deed say that the petitioner will remain a tenant of the property in question if he was regularly paying the rent of that property to the landlord.

12. The next question which arises for consideration of this Court is as to whether this Court has jurisdiction to entertain this Revision Application under section 29(2) of the Bombay Rent Act to correct the findings recorded by the courts below. Undoubtedly, this Court has no jurisdiction to reappreciate the evidence and give its own finding substituting the concurrent findings recorded by the courts below. But whenever the findings appear to be perverse and and if no prudent person can believe that the findings are true on the basis of the evidence and material on record, and if substantial injustice is likely to be caused to the party concerned by drawing wrong inferences without having legal sanctity and recording wrong and perverse findings then this Court would have jurisdiction to re-appreciate evidence for arriving at a correct finding where well settled legal principles of law have not been applied in arriving at the conclusions and findings by the courts below. Certainly, this Court would have jurisdiction to correct the findings recorded by the courts below. In

the present case, the courts below have recorded a finding that the partnership deed is sham and bogus only on the basis of certain facts without looking into and considering the entire evidence and giving due weightage, more particularly when no provision of partnership deed is quoted to be illegal or was not to be applied for the participation of the tenant-defendant no.1. In the present case, the both the courts below have recorded a finding to the effect that the partnership deed is bogus and sham one on the basis mainly two or three facts that the petitioner no.1-tenant was not usually seen on the place of business. The mere absence of the petitioner no.1-tenant at the place of business will not amount to subletting of the rented property to other persons. Unless it is estabished that legal possession has been diverted or parted with to other person without any reasonable cause, then such presumption could have been raised. But in the instant case, five persons have entered into the partnership firm and in that regard, the partnership deed was also registered and all formalities of the partnership firm were completed in accordance with law giving out the names of the petitioner no.1 as one of the partners and also giving out the share of all the partners in the profit and loss account of the business. The presumption drawn by the courts below do not appear to be justified and reasonable. If some manifest error has been committed by the courts below, that error can be corrected by this Court even in revisional jurisdiction and inspite of the fact that manifest injustice has been caused to the party only on the basis of recording erroneous findings of fact only on the basis of inferences, surmises and conjectures, in respect of the partnership deed without having recorded the finding that the petitioner no.1 has parted with legal possession of the premises to other persons.

13. In view of the above discussion and in the facts and circumstances of the case, this Revision Application is deserves to be allowed. Accordingly, this Revision Application is allowed. The judgment and decree dated 10.2.1997 in Regular Civil Suit no. 338 of 1990 passed by the 5th Joint Civil Judge (S.D.), Nadiad and confirmed by the 5th Extra Assistant Judge, Nadiad in Regular Civil Appeal No. 31 of 1997 are hereby set aside. Regular Civil Suit no. 338 of 1990 filed by the respondents-original plaintiffs hereby stands dismissed. Rule made absolute accordingly with no order as to costs.

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